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ABSTRACT

Supreme Court decisions, New York State laws, and Fleischmann Commission findings all determine how New York may aid nonpublic schools. The Supreme Court has upheld a New Jersey law permitting reimbursement to parents for transportation of children attending sectarian schools. It also allowed a New York statute providing textbooks to both public and nonpublic school students. In 1971 the Court handed down the "Lemon Doctrine" summarizing the three tests for all state aid statutes: the statute must have a secular purpose, not advance nor inhibit religion, and not produce an excessive governmental entanglement with religion. By these criteria the court struck down a Rhode Island law giving a salary supplement to private school teachers and a Pennsylvania law reimbursing nonpublic schools for salaries, textbooks, and instructional materials. No Supreme Court decision has found that any state legislation passed all three tests. The Court also struck down a portion of a Pennsylvania law providing auxiliary services to nonpublic schools. State aid to New York nonpublic schools is made more difficult by a strict state constitutional prohibition. New York's Fleischmann Commission reaffirmed the Lemon Doctrine and concluded that vouchers, tuition grants, or student or parent aid plans would be unconstitutional. (Author/JM)

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OCCASIONAL PAPER #3

RE: STATE AID TO NON-PUBLIC SCHOOLS

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RE: STATE AID TO NON-PUBLIC SCHOOLS

Question: Under what conditions may a state expend funds to aid non-public schools without violating the Establishment Clause of the First Amendment?

A. Guiding Tests established by U.S. Supreme Court cases.

In Pierce v. Society of Sisters 268 U.S. 510 (1925), the court was presented with the question of whether Oregon parents may send their children to a religious rather than a public school if the school meets state secular educational requirements and still fulfills compulsory attendance laws. The court affirmed the parents' right to do so. This freedom to educate children in other than public schools has resulted in further litigation as state legislatures have attempted to aid increasing financial burden of educating non-public students.

One of the first cases on point was Everson v. Board of Education of the Township of Ewing et. al. 330 U.S. 1 (1947), in which New Jersey had established a law permitting reimbursement to parents for the transportation of children attending sectarian schools. Appellant contended this was the use of state power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth made applicable to the states. The court held that the First Amendment did not prohibit such aid from

> ...tax raised funds to pay the bus fares of parochial school pupils as a part of

> general program under which it pays the fares of pupils attending public and other schools. (17, emphasis added)... The State contributes no money to the schools. It does not support them. ...The First Amendment has erected a wall between Church and State. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here. (330 U.S. 18)

The next year, in Board of Education v. Allen, 392 U.S. 236 (1948), the Supreme Court upheld a New York statute providing textbooks free of charge to all students in grades seven to twelve, including those in private schools. Relying upon Everson, the Court held that

> The test may be stated as follows: What are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the sign of legislative power as circumscribed by the Constitution. (392 U.S. 243)

As the express purpose of the legislation was to be furtherance of the educational opportunities of the young, and the law merely makes available to all children the benefits of a general program to lend school books free of charge, the financial benefit is to parents and children, not to schools.

A third criteria emerged in another New York case in which a property owner unsuccessfully sought an injunction preventing the New York City Tax Commission from granting property tax exemptions to religious worship, educational, or charitable purposes. The Court held that

> The general principle deducted from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally esta-

> blished religion on governmental interference with religion. 397 U.S. 699 Walz v. N.Y. Tax Comm.
>
> We must also be sure that the end result -- the effect -- is not an excessive government entanglement with religion. The test is inescapably one of degree (397 U.S. 674 emphasis added). In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory on administrative standards. (Id, at 675 emphasis added)

Since freedom from taxation for two centuries has not led to an established church or religion and creates only a minimal and remote involvement of church and state, far less than taxation of churches would entail, the Court upheld the property exemptions.

The next year the Supreme Court explicitly reiterated the three tests that would apply to all state aid to non-public institutions, as gleaned from Everson, Allen, and Waltz.

> First, the statute must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive governmental entanglement with religion." (Lemon v. Kurtzman 403 U.S. 612-613 (1971)

Applying those tests against a Rhode Island plan giving a 15% salary supplement to teachers in non-public schools at which the average per pupil expenditure on secular education is below the average in public schools and in which such teachers taught only secular offerings similar to public schools, and a Pennsyl-

vania program in which non-public schools may be reimbursed for teachers salaries, textbooks, and instructional materials involving secular subjects, the Court found both passing the first two tests of secular legislative purpose and not advancing religion, but failing the third test of governmental entanglement.

Because a teacher's handling of a subject is not ascertainable, and because the Court

> recognize(s) that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. (403 U.S. 618)...A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected (Id., at 619)

In addition, the Court raised not only governmental entanglement, but political entanglement as well. Advocates of secular aid would be expected to lobby for increased aid, as would their opponents against further aid.

> Ordinarily political debate and division, however vigorous or even partisan, are normally healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. (403 U.S. 622)

Because, unlike Walz, which was based on a 200-year-old practice, these innovative programs have self-perpetuating and self-expanding propensities the Court believed a warning signal against entanglement must be raised.

Both New York and Pennsylvania attempted to devise legislation that met the Lemon tests and were the subject of further

comment by the Court. In Committee for Public Education v. Nyquist (413 U.S. 756) (1973), a New York plan provided direct money grants to non-public schools for maintenance and repair; a tuition reimbursement plan for parents of children attending non-public elementary and secondary schools whose taxable income was less than $5,000; a deduction from the taxpayers adjusted gross income to parents failing to qualify for tuition reimbursement. Despite the claim that the maintenance and repair provisions were to insure the students health, welfare, and safety, the Court ruled that the plan failed the second test of advancing religion, and carried with it the grave potential of entanglement.

The Pennsylvania plan provided funds to reimburse parents for a portion of tuition expenses incurred in sending children to non-public schools. In an effort to avoid entanglement, the statute imposed no restructions or limitations on the uses to which the reimbursement allotments can be put, and precluded administrative supervision of the funds. The Court found no difference between Nyquist and the Pennsylvania plan in its primary effect of advancing religion. In addition, appellants asked the Court to sever the provisions and permit tuition reimbursement for parents of children attending schools that are not church-related. This, in turn, was thought to violate the Equal Protection Clause of the Fourteenth Amendment, requiring payment to church-related school children. The Court regarded the argument as spurious.

> Even if the Act were clearly severable, valid aid to non-public, non-sectarian

> schools would provide no lever for aid to their sectarian counterparts. The Equal Protection Clause has never been regarded as a bludgeon with which to compel a state to violate other provisions of the Constitution. Sloan v. Lemon 413 U.S. 834 (1973)

On commenting on the plight of the defendants, the Court stated,

> ...we are not unaware that appellants and those who have endeavored to formulate systems of state aid to non-public education may feel that the decisions of this Court have, indeed, presented them with the 'insolube paradox' to which Mr. Justice White referred in his separate opinion in Lemon v. Kurtzman. 403 U.S., at 668. But if novel forms of aid have not readily been sustained by this Court, the 'fault' lies not with the doctrines which are said to create a paradox but rather with the Establishment Clause itself: 'Congress' and the States by virtue of the Fourteenth Amendment 'shall make no law respecting an establishment of religion.' With that judgment we are not free to tamper, and while there is 'room to play in the joints' Walz v. Tax Comm, supra, A 669, the Amendment's proscription clearly forcloses Pennsylvania's tuition reimbursement program. 413 U.S. 835.

To date, no Supreme Court case has arisen which has successfully passed the three tests elucidated in Lemon v. Kurtzman. Although legislatures have displayed great ingenuity in devising the 'innovations' for aiding sectarian schools, the programs usually attempt to avoid advancing religion or religious instruction. However, to do so, the state must become excessively entangled with the aided schools to avoid violating the First Amendment. If the legislatures attempt to avoid entanglement, the programs fail because they advance religion. As a result, such programs as tuition grants (Sloan v. Lemon 403 U.S. 602 (1971), tax credits, (Committee for Public Education v. Nyquist

413 U.S. 757 (1973)), aid for testing and other state mandated services, Committee for Public Education v. Levitt (324 F. Supp. 439 (SDNY 1972), aff'd, 37 L. Ed. 2d 736 (1973)) and public rental of private school facilities (Americans United for Separation of Church and State v. Paire 41 U.S.L.W. 2149 (D.N.H., Sept. 13, 1972) vacated and remanded, 41 U.S.L.W. 2536 (1st cir., March 6, 1973).), have all been held unconstitutional as devised.[1]

In the most recent Supreme Court case, a Pennsylvania statue authorized direct loans of textbooks and instructional materials to children in non-public elementary and secondary schools, as well as auxiliary services such as counseling, testing, psychological services, speech and hearing therapy, and related service for exceptional, remedial, or educationally disadvantaged students. The Court held that all but the textbook loan provision violated the Establishment Clause of the First Amendment.

> As in Allen, Act 195 provides that the textbooks are to be lent directly to the student, not to the nonpublic school itself, although, again as in Allen, the administrative practice is to have student requests for the books filed initially with the nonpublic school and to have the school authorities prepare collective summaries of these requests which they forward to the appropriate public officials...Thus, the financial benefit of Pennsylvania's textbook program, like New York's, is to parents and children, not to the non-public schools. Meek v. Pittenger 421 U.S. 350 (1975).

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1 By no means does this list exhaust the litigation in this area. Appendix I contains some forty-six cases that should be examined for a fuller appreciation of the difficulties that may be encountered by those who would use State funds to aid non-public schools.

However, the Court concluded that the remainder of the Pennsylvania Act violated three other tests: advancing religion; administrative entanglement; political entanglement.

> In fact, of the 1,320 non-public schools in Pennsylvania that comply with the requirements of the compulsory attendance law and thus qualify for aid under Act 195, more than 75% are church-related or religiously affiliated educational services. Thus, the primary beneficiaries of Act 195's instructional material and equipment loan provisions...are non-public schools with a predominant sectarian character. 421 U.S. at 364

Faced with the substancial aid ($12 million) the statute would provide, the Court rejected the argument that the aid was only secular in nature.

> Substancial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole...For this reason...direct aid...even though ostensibly limited to wholly neutral, secular instructional material and equipment, in escapably results in the direct and substantial advancement of religious activity. 421 U.S. at 366

In addition, the Court held that the Act would lead to excessive administrative and political entanglement, <u>despite the fact that teachers and counselors providing auxiliary services were employees of public intermediate units</u>.

> Whether the subject is 'remedial reading', 'advanced reading' or simply 'reading' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persits. 421 U.S. at 370

To insure that the auxiliary teachers remain religiously neutral, continuing surveillance of the sort prohibited in <u>Lemon</u> would be necessary. The Court also found the potential for divi-

sive conflict over future aid.

> The recurrent nature of the appropriation process guarantees annual reconsideration of Act 194 and the prospect of repeated confrontation between proponents and opponents of the auxiliary-services program... this potential for political entanglement, together with the administrative entanglement...compels the conclusion that Act 194 violates the constitutional prohibition against laws 'respecting an establishment of religion.' 421 U.S. at 372.

Thus the Court has so strictly interpreted the Lemon tests that the mere potentiality of political entanglement is sufficient to deny constitutionality, and that the use of teachers employed by a public intermediate unit in non-public schools exceeds the 'continuing surveillance' test of administrative entanglement. In addition, any substantial aid for secular purposes will be construed as sectarian aid that results in the advancement of religion.

Even more foreboding for those who would attempt to aid non-public schools was the concurring opinion of Justice Brennen, joined by Douglas and Marshall, who declared that the textbook aid should have also been declared invalid.

> But whether or not Allen can withstand overruling in light of Kurtzman and Nyquist, which I question, it is clear that...the textbook loan program of Act 195, equally with the program for loan of instructional materials and equipment, violates the Establishment Clause. The plurality's answer is that a difference in result is justified because Act 195 distinguished between recipients of the loans: textbooks are lent to students, while instructional material and equipment are lent directly to the schools. That answer will not stand analysis. 421 U.S. at 378,379

As reported in the New York Times, January 11, 1977,

> The Supreme Court has agreed to hear a challenge to the constitutionality of an Ohio law that provides to children at parochial and other private schools certain materials, equipment and services that are available to children at public schools. Under the law, materials are on 'loan' to pupils and their parents, rather than to the schools themselves, and some services, such as guidance and counseling, are performed off the premises of the school. A lower Federal court ruled last summer that the law, at least on its face, was constitutional. (Wolman v. Essex) docket no. 76-496.

Apparently, the Court wishes to further define and clarify its holdings in Meek. Whether it will find the Ohio statute similarly offensive to the Establishment Clause or rather a model of acceptable innovations is moot.

B. New York State

New York State has been a frequent contributor to the Supreme Court docket in the area of non-public school aid. Walz, Allen and Nyquist were reviewed above. In addition, Zorach v. Clauson 343 U.S. 306 (1952) affirmed the right of school officials to permit released time for students to attend religious classes, although no expenditure of State funds was involved.

State aid to non-public schools is made even more difficult in New York State by a strict State constitutional prohibition (See Appendix II). Interestingly, however, in Committee for Public Education and Religious Liberty v. Levitt 343 F Supp. 439 (S.D.N.Y. 1972), which attempted to avoid the Lemon entanglement issue by not having recipient schools account for expenditure of funds received for state-mandated testing programs and the keeping of

health and attendance records, it was not the state, but rather the federal constitution which was invoked to overturn the law.

C. Fleischmann Commission Findings

In a similar review, the Fleischmann Commission[1] found that non-public schools may be aided by the types of funding found permissible in Lemon, that is,

> Our decisions from Everson to Allen have permitted the states to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause. 268 U.S. 616

In addition, "released time" and "dual enrollment" meet the criteria of the courts, as does aid to exceptional children and non-public institutional schools (see Sargent v. Board of Education, 177 N.Y. 317). However the Fleischmann Commission concluded that both regulated and unregulated vouchers, tuition grants, and student or parent aid plans would be unconstitutional according to the Lemon test. (And, of course, Nyquist was the confirmation by the court of their conclusion).

D. Summary

In conclusion, it appears that achieving an acceptable state aid program to non-public schools requires that the legislation must have a clearly secular intent; must not advance religion; must not foster excessive government or political entanglement.

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[1] Report of the New York State Commission on the Quality, Cost, and Financing of Elementary and Secondary Education. (Volume 1) 1972. Appendix A.

So strictly has the Supreme Court interpreted these Lemon tests that a University of Illinois College of Law Professor proclaimed:

> Last term, the Supreme Court of the United States ended the possibility that the states would be able to grant any meaningful form of aid to students attending parochial elementary or secondary schools. Although there is room for debate on the exact implications of the opinion, in Meek v. Pittenger there appears to be a majority of the justices who would prohibit any such aid under the religion clauses of the first amendment. 70 N.W. Univ. Law Rev. at 883

The Court apparently will further delimit and define the tests in a case soon to be heard. Unless that decision flys in the face of the most recent cases, it appears that the decisions reviewed here preclude even peripheral aid to non-public schools.

APPENDIX I

STATE AID TO PRIVATE SCHOOLS

Wheeler v. Barrera 42 USLW 4877 (U.S. June 10, 1974)

State ex rel Warren v. Nusbaum 219 NW2nd 577 (Wis. 1974)

Paster v. Tussey 512 SW2nd 97 (Mo. 1974)

Goffney v. State Dept. of Education 220 NW2nd 550 (Neb. 1970)

Meek v. Pittinger 421 US 349 (1975)

Americans United for Separation of Church and State v. Dunn 384 F Supp 714 (MD Tenn, 1974)

Blanton v. Americans United for Separation of Church and State, Appeal Filed, 43 USLW 2227 (U.S. Dec. 3, 1974)

Nebraska v. Swanson 219 NW2nd 762 (Neb. 1974)

Clayton v. Kerwick 50 NY 523, 285 A.2d 11 (1972)

Brusea v. Missouri ex rel State Board of Education 332 F. Supp 275 (E.D. Mo. 1971), aff'd mem, 92 Sup G. 1493 (1972)

Jackson v. California 460 F2d 282 (9th Cir. 1972)

John v. New York State Education Department 449 F2d 871 (2d cir. 1971) 449 F2d 871 (2d Cir. 1971)., cert. granted, 405 US 916 (1972); vacated and remanded, 41 USLW 4018 (U.S. Nov. 20, 1972)

Weiss v. Bruno 82 Wash2d 199, 509 P2d 973 (1973)

Fisher v. Clackamas County School District 507 P2d 839 (Ore. Ct. App. 1973)

Board of Education v. Bakalis 54 I112d 448, 299 NE2d 737 (1973)

Luckemeyer v. Kaufmann 364 FSupp 376 (WD Mo. 1973) Appeal filed 42 LW 3638 (U.S. Apr. 26, 1974)

Vicaso v. Robinson 403 U.S. 602 (1972)

Sherbert v. Verner 374 U.S. 398 (1963)

Public Funds for Public Schools of New Jersey v. Marbarren 358 F Supp 29 (ONJ 1973), petition for cert. filed

Wolman v. Essex 409 U.S. 808 (1972)

Lemon v. Kurtzman 403 U.S. 602 (1971)

Everson v. Board of Education 330 U.S. 1 (1947)

Board of Education v. Allen 392 U.S. 236 (1948)

Walz v. New York Tax Commission 397 U.S. 604 (1970)

Lemon v. Sloan 413 U.S. 825 (1973)

Committee for Public Instruction and Religious Liberty v. Nyquist 413 U.S. 756 (1973)

Kosyder v. Wolman 41 USLW 2348 (USDC Ohio Dec. 29, 1972) aff'd. mem. sub. nom, Grit v. Wolman 37 L.Ed.2d 1021 (1972)

Protestants and Other Americans United for Separation of Church and State v. Essex 28 Ohio St2d 79, 275 N.E.2d 603 (1971)

Americans United for Separation of Church and State v. Oakley 339 F. Supp. 545 (D.C. Ut. 1972)

Committee for Public Education and Religious Liberty v. Levitt 413 U.S. 472 (1973)

State ex rel. School District of Hartington v. State Board of Education 188 Neb. 1, 195 N.W.2d 161 (1972)

Americans United for Separation of Church and State v. Paire 41 USLW 2149 (D.N.H., Sept. 13, 1972) vacated and remanded, 41 U.S. L.W. 2536 (1st Circuit, March 6, 1973)

Hunt V. McNair 413 U.S. 734 (1973)

Tilton v. Richardson 403 U.S. 672 (1971)

Buford v. Southeast Dubois School Corporation 472 F.2d 890 (7th Cir., 1973), cert. denied 93 S.Ct. 2151 (1973)

McDonough V. Aylward 500 S.W.2d 721 (Mo., 1973)

Opinion of the Justices 357 Mass. 846, 259 N.E.2d 564 (1970)

Norwood v. Harrison 340 F. Supp. 1003 (N.D. Miss. 1972) reversed 413 U.S. 455 (1973)

Graham v. Evangeline Parish School Board 484 F2d 649 (5th Cir. 1973)

Johnson v. Sanders 319 F. Supp. 421 (Conn., 1970)

Seegars v. Parker 241 So.2d 213 (La., 1970)

In Re Proposal C, 185 N.W.2d 9 (Mich, 1971)

Opinion of the Justices 259 N.E.2d 564 (Mass. 1970)

Hartness V. Patterson 179 S.E.2d 907 (S.C., 1971)

APPENDIX II

(Use of public property or money in aid of denominational schools prohibited; transportation of children authorized.) § 3. Neither the state nor any subdivion thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning. (Formerly § 4 of Art. 9. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938. Formerly § 4, renumbered § 3 without change by amendment approved by vote of the people November 6, 1962; former § 4 repealed by same amendment.)